equally imposed or enforced upon every person immigrating to such state from any other foreign country, and any law of any state in conflict with this provision is hereby declared null and void." (16 Statutes at Large 144.)

By the term *charge*, as here used, is meant any onerous condition, it being the evident intention of the act to prevent any such condition from being imposed upon any person immigrating to the country, which is not equally imposed upon all other immigrants, at least upon all others of the same class. It was passed under and accords with the spirit of the Fourteenth Amendment. A condition which makes the right of the immigrant to land depend upon the execution of a bond by a third party, not under his control and whom he cannot constrain by any legal proceedings, and whose execution of the bond can only be obtained upon such terms as he may exact, is as onerous as any charge which can well be imposed, and must, if valid, generally lead, as in the present case, to the exclusion of the immigrant.

The statute of California which we have been considering imposes this onerous condition upon persons of particular classes on their arrival in the ports of the state by vessel, but leaves all other foreigners of the same classes entering the state in any other way, by land from the British possessions or Mexico, or over the plains by railway, exempt from any charge. The statute is therefore in direct conflict with the Act of Congress.

It follows, from views thus expressed, that the petitioner must be discharged from further restraint of her liberty; and it is so ordered.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MARYLAND.[1]

SUPREME COURT OF OHIO.[2]

SUPREME COURT OF VERMONT.[3]

SUPREME COURT OF WISCONSIN.[4]

ACTION.

Case.—Pleading.—The defendant made false and fraudulent representations to the plaintiff as to facts which he asserted had actually

[1] From J. Shaaff Stockett, Esq., Reporter; to appear in 39 Maryland Reports.

[2] From Hon. M. M. Granger, Reporter; to appear in 24 Ohio St. Reports.

[3] From J. W. Rowell, Esq., Reporter; to appear in 46 Vermont Reports.

[4] From Hon. O. M. Conover, Reporter; to appear in 34 Wisconsin Reports.

taken p ace, whereby the plaintiff was induced to buy of the defendant an interest in a certain patent-right, and was thereby damnified. *Held*, that the defendant was liable therefor in an action on the case. *Somers* v. *Richards*, 46 Vt.

In an action on the case, it is not necessary for the plaintiff to prove all the allegations of the declaration as to the means used by the defendant in doing the act complained of, provided less than all are sufficient to constitute a cause of action, and what are proved are sufficient: *Id.*

COMPOSITION DEED. See *Debtor and Creditor*

CONTEMPT. See *Receiver.*

Disregard of Order of Court—Ignorance—Impossibility of Compliance.—In general a party to a suit will not be adjudged in contempt therein for any act or omission which occurred before the suit was commenced or before service of the process alleged to have been disregarded: *Witter* v. *Lyon and others*, 34 Wis.

An order to show cause why a party should not be punished for a contempt, obtained on *ex parte* affidavits and other proofs, may be discharged on evidence of the same kind produced by the party against whom such order was granted; or the court may allow written interrogatories to be filed by the party moving for such order, and require specific answers to be made thereto under oath: *Id.*

Plaintiffs obtained an injunction restraining defendants from removing certain bonds beyond the jurisdiction of the court, and requiring them to deposit such bonds with the treasurer of this state. Afterwards they procured an order upon defendants to show cause why they should not be punished for a contempt in disobeying such injunction; and defendants answered that the bonds had been removed and deposited in Chicago before any process was served upon them in the action, that it was impossible for them to acquire possession or control of the bonds so as to comply with the mandate of the court. *Held*, that the court did not err in discharging the order upon this answer and affidavits filed in support thereof: *Id.*

CONTRACT. See *Debtor and Creditor.*

Implied Obligations on both Parties—Damages for Prevention of Performance.—In an action for damages, the plaintiffs alleged in the declaration that they had agreed with the defendant to build him a house for which he agreed to pay them a certain price; that, in pursuance of said agreement, they began to build the house and were ready and willing to complete it, but that the defendant prohibited and forcibly prevented them from so doing, and compelled them to desist from the work. Another count set forth the contract and the work done under it by the plaintiffs in detail, and alleged that the plaintiffs were then and there ready, willing, and anxious to comply with the contract in every particular, but were prevented from so doing by the defendant. Verdict being for the plaintiffs; upon appeal from an order overruling a motion in arrest of judgment, *Held*: 1st. That from this contract an obligation by the defendant to suffer the house to be built was implied. 2d. That though the defendant had the right to stop work on the building, yet, by so doing, he committed a breach of contract and incurred a liability

to pay the damages that might result therefrom. 3d. That the damages in such case would include compensation for the labor done and materials furnished, and such further sum as might, by legal principles, be assessed for the breach of the contract. 4th. That though the declaration omitted in terms to aver the implied promise of the defendant and was not very technical in stating the breach thereof, yet the fact of prevention was alleged as the breach, and this was sufficient; especially after verdict, which is aided by intendment: *Black* v. *Woodrow and Richardson*, 39 Md.

Corporation.

Conversion of Bonds into Stock —A railroad company, having a capital stock of $1,500,000, with power, by its charter, to increase the stock to any necessary amount, and with authority to allow and pay interest on its stock, issued its bonds, bearing interest payable semi-annually, and containing a provision that the bonds might, within a specified time, be converted into stock of the road at the option of the holder. Interest was accordingly allowed to the stockholders up to the date of the first dividend, and was paid by issuing to them new stock; the sum so paid, however, not exceeding the net earnings of the road during the time named. *Held*, that a bondholder, who had been regularly paid the interest on his bonds up to the time of the dividend, and who then elected to convert his bonds into stock, was only entitled to receive stock to the amount of the principal sum specified in the bonds, and could claim no part of the new stock so issued by the company, nor any compensation or allowance, in stock or otherwise, on account thereof: *Sutliff* v. *C. and M. Railroad Co.*, 24 Ohio St.

Covenant.

Effect of Recital in Charter—Legislative Grant—Estoppel by Deed—Presumption of Identity of Persons of same Name.—The charter of Harris Gore was dated October 30th 1801, and recited that the grant of said territory was made by the legislature, February 25th 1782, to G. and others. On June 1st 1789, G., by deed of warranty, conveyed "one whole right and share in said gore, drawn in my name to me," to G. Jr. The lands of said gore were not in fact allotted or divided till the year 1802. *Held*, that the recital of the grant in the charter, was at least *primâ facie* evidence of the fact; and that said grant at once vested title to said lands in the grantees, as effectually as when engrossed and recorded: *Cross* v. *Martin*, 46 Vt.

When one having no title to land, conveys it with covenants of warranty, and subsequently acquires title thereto, his title enures to, and vests in, his grantee, by operation of law, in discharge of his covenants: *Id.*

Parties in successive deeds constituting a chain of title, of the same name, are presumptively the same persons; and in this country, there is no intendment that a party, in twenty years, may not change his residence: *Id.*

A deed from G. of H., to G. Jr. of H., was presumed to be from father to son: *Id.*

Criminal Law.

Discharge of Jury before Verdict.—In a criminal cause, the discharge

of the jury without the consent of the defendant, after it has been duly impannelled and sworn, but before verdict, is equivalent to a verdict of acquittal, unless the discharge was ordered in consequence of such necessity as the law regards as imperative: *Hines* v. *State*, 24 Ohio St.

In such case, the record must show the existence of the necessity which required the discharge of the jury; otherwise, the defendant will be exonerated from the liability of further answering to the indictment: *Id.*

Principal and Accessory.—One who, participating in the felonious intent, is present, aiding and abetting the commission of a murder, or other felony, is a principal, although not himself the immediate perpetrator of the act: *Warden* v. *State*, 24 Ohio St.

The presence, either actual or constructive, of the accused at the commission of a felony, is not a necessary ingredient in the offence of aiding, abetting or procuring another to commit it, defined by section 36 of the Crimes Act: *Id.*

DAMAGES. See *Contract.*

DEBTOR AND CREDITOR.

Composition—Rescission of Contract—Rights of other Parties.—Where it appears clearly that one entered into a contract under a *bonâ fide* mistake, ignorance or forgetfulness of facts material thereto, he may avoid or rescind the contract on that ground, provided the rights of innocent third parties will not be prejudiced by such avoidance: *Johnson* v. *Parker*, 34 Wis.

In such a case it is not material to inquire whether such person might not, by reasonable diligence, have ascertained the facts which he had forgotten, or in regard to which he was so mistaken or in ignorance: *Id.*

But where several creditors have agreed with their debtor to compromise their claims against him at a stipulated rate, each agreeing to such compromise upon consideration of the like agreement of the others, no one of them can avoid or rescind such agreement on his part upon the ground that it was made through mistake, forgetfulness or ignorance as to the amount or situation of his claim, or the manner in which it was secured: *Id.*

There is a *conclusive presumption* of law in such cases that the setting aside of such a settlement, in favor of one creditor, upon any of the grounds named, would be injurious to the other creditors; and the debtor may avail himself of the objection, in a suit against him alone, because that is a necessary means of protecting such other creditors: *Id.*

It is not necessary to entitle creditors to the protection of this rule, that they should have *convened*, or that a formal promise should have been made by each to all the others to abide by the settlement. It is sufficient that they have communicated with each other *through the debtor*, by accepting his proposition in writing made in the same form to each, from which it appears that the consideration for the promise of each was the like promise made by the others: *Id.*

DEED. See *Covenant.*

Repugnant Descriptions.—Where land was described in a deed of conveyance as lying north of a specified road, and was also described by boundary lines, which include the road-bed: *Held*, that the repugnancy

between the two descriptions is not irreconcilable, and that the road-bed is included in the conveyance: *Williams et al* v. *Sparks*, 24 Ohio St.

DOWER. See *Husband and Wife.*

EQUITY.

Injunction of other Proceedings in Equity.—A court of equity will not interfere by injunction to stay proceedings in another equitable suit in the same court: *Drayton* v. *Relf*, 34 Wis.

The action to foreclose, by the tax title claimant against the original owner, provided by ch. 22, is equitable in its nature; and if the defendant therein is entitled, under ch. 89, to the five years' term for redemption, which has not yet expired, that fact should be set up in the same action; and a separate suit to restrain upon that ground the foreclosure action, cannot be maintained: *Id.*

ESTOPPEL. See *Covenant; Municipal Corporation.*

EVIDENCE. See *Covenant; Sale.*

Testimony of Deceased Witness.—Where the defendant in a suit, testifying to what a deceased witness has proved on a former trial of the same cause, stated that he could give *substantially* the testimony of the deceased witness as to a certain point, but could not give all his testimony as to a certain other point. *Held*, That this evidence could not be admitted: *Black* v. *Richardson*, 39 Md.

Proof of Handwriting—Receipt.—A witness, to prove handwriting, must have such knowledge of it as to enable him to form some opinion of its genuineness when he sees it: *Guyette* v. *Bolton*, 46 Vt.

A receipt in full of a demand named therein, is a full and perfect *primâ facie* defence to an action for the recovery thereof, and casts upon the plaintiff the burden of explaining it, or in some way destroying its effect as evidence: *Id.*

Expert.—Sec. 14, p. 711, Tay. Stats., which provides that no person "practising physic and surgery" in this state shall "testify in a professional capacity as a physician and surgeon in any case, unless such person shall have received a diploma," &c., applies only to cases in which such persons are called upon to testify to their opinions as experts: *Montgomery* v. *Town of Scott*, 34 Wis.

In an action for injuries to plaintiff's person alleged to have been caused by a defective highway, a witness for plaintiff, not shown to have received such diploma, was permitted to testify that "both bones of plaintiff's leg were broken three fingers wide above the ankle." It afterwards appeared that the witness set and dressed the leg. *Held*, that as the fact testified to was not one requiring professional skill for its determination, and the witness was not called upon to express any opinion *as an expert*, there was no error in receiving the testimony: *Id.*

A physician examined as an expert may testify as to the probable effects of wounds and injuries upon the future general health; as, in this case, to plaintiff's liability to paralysis from the injured limb: *Id.*

FORMER ACTION.

Effect of a Judgment for the Contract Price, as a Bar to the Subsequent Recovery of Damages for a Breach of the Contract.—The defend-

ant contracted to dig a cellar and lay a cellar-wall for the plaintiff by a certain time, at a certain price; but did not complete it within the time; whereby the plaintiff suffered damage. After the job was finished, the defendant brought suit against the plaintiff, to recover the balance of the contract price due for the work, and recovered judgment by default for the full amount thereof, and collected said judgment. Afterwards, the plaintiff brought this action to recover his damages for the breach of said contract. *Held*, that said judgment and the satisfaction thereof, were not a bar to the plaintiff's right of recovery: *Davenport* v. *Hubbard*, 46 Vt.

Gilson et al. v. *Bingham*, 43 Vt. 410, commented upon and explained: *Id.*

Highway.

Liability of City for Defects in—Presumptions.—The liability of a city for injuries to the person resulting from a defective sidewalk which the city was bound to repair, is settled and no longer open to discussion in this court: *Colby and Wife* v. *City of Beaver Dam*, 34 Wis.

The charter of the defendant city (P. & L. Laws of 1871, ch. 224), after conferring upon the common council expressly the power to direct the manner in which sidewalks shall be constructed in the first instance by the lot-owner, and to cause them to be built if the latter shall neglect to do so, further provides that "whenever the street commissioner shall deem it necessary to repair any sidewalk constructed by said city within its limits," he shall direct the owner or occupant of the adjoining lot to make such repair in a time and manner to be prescribed by the commissioner, and in case of his neglect, shall cause the same to be made at the expense of the lot, &c. *Held*, 1. That the power to direct repairs here given extends to all sidewalks which the city has ordered to be built, and over which it exercises care and control. 2. That under this charter the city is bound to repair any defect in such a walk, which endangers the safety of travellers: *Id.*

There was no error in instructing the jury that if the defect in a sidewalk which caused the injury complained of, had existed for such a length of time that by the exercise of reasonable care and diligence the city authorities would have discovered it, knowledge on their part might be presumed; there being evidence which rendered such instruction pertinent: *Id.*

Husband and Wife.

Ante-Nuptial Agreement—Barring of Dower and Homestead.—The plaintiff was the second wife of the intestate, who died without issue of their marriage. An ante-nuptial agreement was entered into between them, whereby a pecuniary provision was made for her in lieu of dower, and whereby she covenanted to claim no share in his estate otherwise than according to the provisions of said agreement. The plaintiff did not elect to waive the provision made for her by said agreement, but, induced by the fraud and artifice of the only son and sole heir of the intestate, accepted and received the same in full of all claim against said estate, and retained the same without offering to restore it to the estate. *Held*, that the plaintiff was thereby barred of dower and homestead: *Hathaway* v. *Hathaway's Estate*, 46 Vt.

Held, also, that without waiver of said provision, and notice of it in writing, the Probate Court had no power to decree the plaintiff home-

stead and dower, although said provision was wholly inadequate for her support: *Id.*

The Probate Court, on the plaintiff's application, caused homestead and dower to be set out to her, from which proceeding this appeal was taken. *Held*, that although such proceeding might be considered as equivalent to a decision that said provision was not sufficient for her support, and to an extension of the time for making election; yet, that it could not supply the indispensable requisites of election, waiver, and notice thereof in writing to the Probate Court—acts to be done by the plaintiff: *Id.*

INJUNCTION. See *Equity*.

INSURANCE.

Assignment of Policy of Insurance—Assignee takes subject to Equities.—The assignee of a policy of insurance takes it subject to all the equities which attach to it in the hands of the insured; and on a suit by the assignee the insurer has a right to claim any set-off, or make any defence he could have made against the insured at the time of notice of assignment: *Johnson* v. *Phœnix Insurance Co.*, 39 Md.

If the insurer assent to the assignment or by his act or conduct induces the assignee to take the same, under the belief that no claim exists against the insured, then no such defence or set-off could be relied on in a suit by the assignee: *Id.*

G. insured a cargo of shooks with the P. Ins. Co.—The shooks arrived in a damaged condition, and it was agreed to sell them at auction and adjust the loss. G. wrote a note to the agent of the insurance company transferring to J. B. & Co. the settlement of the insurance as soon as arrangements were made with the auctioneer to sell them. On this the agent endorsed "the net proceeds of sales of the within-named shooks would come in the usual course to Mr. G., but in accordance with his request I will arrange with B. & Co. (the auctioneers,) to hold the amount for your (J. B. & Co.'s) account." The loss on the shooks was determined by an adjuster to be $905.16. Afterwards the P. Ins. Co. sued J. B & Co. as guarantors on a note of G., growing out of an independent transaction, and the defendants proposed to set off against the plaintiff's claim the $905.16, which was alleged to be due to the defendants under the above assignment. *Held*: 1st. That the endorsement of the plaintiff's agent did not recognise the right of the defendants to $905.16, but to the proceeds arising from the sale. 2d. That the plaintiff's right to set-off against G.'s claim for $905.16 a sum due it, was superior to any claim which the defendants had on the $905.16 in virtue of the above assignment: *Id.*

MORTGAGE.

Agreement to treat as Security only.—The stipulation in a mortgage, that it is not to be foreclosed until the property of the makers of the note, which it is given to secure, is exhausted, is complied with, where, after judgment on the note against the makers, it appears they have no property subject to execution. The creditor is not bound to bring suit to exhaust the equities of the judgment-debtors, before foreclosing the mortgage: *Riblet* v. *Davis et al.*, 24 Ohio St.

An execution issued on a judgment by confession, was levied on the goods of one of the judgment debtors, on whose application the judg-

ment was modified and the execution set aside, whereby the goods were lost to the judgment-creditor. *Held*, that in the absence of fraud or collusion on the part of the creditor, his right to recover the whole amount of the debt of a co-surety of such judgment-debtor was not affected by the discharge of the levy: *Id.*

MUNICIPAL CORPORATION. See *Highway; Negligence.*

Improvement of Street—Jurisdiction of Councils.—Where the charter of a city authorizes the common council to improve a street at the expense of adjoining lots, only upon presentation to it of a petition for such improvement signed by the owners of a certain specified proportion of the lot frontage on such street, the presentation of such petition, bearing the names, as signers, of persons actually owning the required proportion of such lot frontage, which names have been actually signed by those persons themselves or by their authority, is essential to give the council jurisdiction: *Canfield* v. *Smith*, 34 Wis.

Where the improvement has been made by the council without such petition, the owner of a lot assessed therefor, and sold for non-payment of the assessment, is entitled (where he has not estopped himself in any way from demanding such relief) to a judgment in equity declaring void the certificate of such sale and restraining the issue of a deed thereon: *Id.*

Where, in such a case, there was a petition presented to the council purporting to be signed by persons owning the required proportion of frontage on said street, the plaintiff, under a complaint which merely alleges that "no petition was ever presented by the owners of" such proportion of frontage, may show that some of the signers of said petition did not own the amount of frontage claimed by them, and that the names of others appearing as signers were not affixed by themselves nor with their consent: *Id.*

The plaintiff (who was not one of the signers of said petition) is not estopped from alleging a want of power in the common council by the fact that, having notice that the work was ordered, he did not interpose the objection until the work was done: *Id.*

NEGLIGENCE. See *Evidence; Highway; Railroad.*

Contributory.—Where the carelessness of the plaintiff, as well as that of the defendant, operated directly to produce the injury complained of, the plaintiff has no right to recover. And in a case where the defendant is entitled to and requests a charge to that effect, the refusal or neglect of the court to so instruct the jury, in unambiguous terms, is error, for which a judgment in favor of the plaintiff will be reversed: *Pittsburgh, F. W. & C. Railway Co.* v. *Krichbaum's Adm'r.*, 24 Ohio St

Contributory Negligence in Law—Liability of a Municipal Corporation for Injury resulting from Obstruction of a Street.—Negligence is the want of such care as men of ordinary prudence would use under similar circumstances; and the question as to whether the act of a party amounts in law to negligence, depends upon the danger which might reasonably be expected to result therefrom: *Mayor, etc*, v. *Holmes*, 39 Md.

In July 1872, the City of Baltimore, through its water department,

was engaged in laying water-mains along a portion of the west side of Charles street, the whole work, including excavating and repaving, being done in five days. The plaintiff was employed to haul material from a house on the west side of Charles street above Saratoga street, and, coming to the house on the 4th of July for a load, found a ridge of stones, occasioned by the work referred to, along the west side of the street in front of and beyond the house. At this time he made no attempt to cross over the stones, but, stopping his horse on the east side of the street, carried the materials, with the assistance of persons working in the house, to the cart. On the 8th of July, the street being obstructed as before, he made his first load in the same manner, but on his return for a second load, not finding any one to help him, and the materials being heavy, he attempted to lead his horse over the stones. While so doing, the horse stumbled, and in falling struck the plaintiff on the leg and broke it. The horse was sound and steady, and the plaintiff was leading him carefully. The plaintiff having brought suit against the city for damages, the defendant offered evidence that the plaintiff had been cautioned by the owner of the materials to be careful in crossing the ridge, because he thought it was dangerous; and that the work which caused the obstruction had been carefully and promptly done by experienced and competent workmen. At the trial the court submitted the question of negligence, both on the part of the plaintiff and defendant, to the jury; verdict and judgment being for the plaintiff, on appeal by the defendant, it was *Held* that this instruction was proper, the act of the plaintiff not being contributory negligence in law: *Id.*

New Trial.

After-discovered Evidence.—A new trial should not be granted on the ground of newly discovered evidence, unless the legitimate effect of such evidence, when considered in connection with that produced on the trial, ought to have resulted in a different verdict or finding. The rule of practice, on this subject, was not substantially changed by section 297 of the code of civil procedure: *Cleveland, etc., R. R. Co.* v. *Long*, 24 Ohio St.

Railroad. See *Tort.*

Evidence in Action for Injury by Fire occasioned by one of its Engines —Onus Probandi.—In an action against a railroad company for so negligently managing one of its engines, that certain cord-wood and growing timber of the plaintiff whose land adjoined the road, was destroyed by fire emitted from the engine, the plaintiff, for the purpose of proving that the fire in question was occasioned by the defendant's engine, and as tending to prove negligence on the part of the defendant in the construction and management of its engines, may show that within a week before the fire in question, the engines of the defendant in passing had scattered large sparks which were capable of setting fire to combustible articles along the road, and that frequent fires, occasioned by such sparks, had been put out within that time: *Annapolis and Elkridge Railroad Company* v. *Gantt*, 39 Md.

Under Article 77 of the Code, in an action against a railroad company for injury done the property of the plaintiff by fire occasioned by the engines of the defendant, it is not incumbent on the plaintiff to prove

that the fire was caused by the defendant's negligence; but the *onus* is cast on the defendant to show affirmatively that it has used reasonable care to prevent the causing of injury by fire from its engines: *Id.*

In an action under the Code, against a railroad company for injury done to certain cord-wood and growing timber of the plaintiff, by fire occasioned by the engine of the defendant, the fact that the fire began on the track of the railroad and spread thence to the plaintiff's land adjoining, causing the injury to his property, will not avoid the liability of the railroad company, the evidence showing that the injury was the direct consequence of the fire occasioned by the defendant's engine: *Id.*

The safe rule as to the liability of railroad companies under Article 77 of the Code, for damages by fire occasioned by their engines or carriages, is that when their liability arises, it extends to all the near and natural consequences of their wrongful act, and not to those which are remote, incidental or exceptional: *Id.*

In a case where the fire has not been communicated directly to the plaintiff's property by sparks or cinders from the locomotive of the defendant; as where it has spread from its first beginning, and thus been communicated indirectly to the plaintiff's property, it is a question proper to be submitted to the jury to determine from all the facts of the case, whether the injury complained of is the natural consequence of the defendant's negligence, or whether it has been caused by "some intervening force or power which stands naturally as the cause of the misfortune:" *Id.*

Receiver.

Title of—Protection by the Court—Contempt.—A final order in a proceeding for contempt is appealable: *Matter of Day, on Complaint of Benson, Receiver*, 34 Wis.

Where property is legally in possession of a receiver appointed by the court, it is the duty of the court to protect his possession, not only against violence but against suits at law: *Id.*

By agreement between the parties in interest, one-fourth of the shingles manufactured from certain lumber at a certain mill were to be delivered by the mill-owners, as the property of E. & B. to X., who had been appointed by the court "receiver of all moneys, assets and property" of said E. & B.; and the mill-owners afterwards delivered certain shingles made from such lumber to X, as a part of the one-fourth belonging to said firm. *Held*, that X. was lawfully in possession of such shingles as receiver, and that if there had been a mistake in such delivery, and the shingles belonged in fact to D., the only remedy of the latter was by application to the court for redress, or for leave to sue; and he could not lawfully take possession of the shingles and convert them to his own use: *Id.*

In a proceeding against D. for a contempt in taking such shingles from the receiver's possession, where it appeared that he had sold them and they had been removed from the state, the court did not err in finding the value and ordering D. to pay the same to the receiver; nor in further ordering that he be allowed to deduct from such value the amount paid by him for manufacturing the shingles; nor in appointing a referee to determine and report the amount so paid: *Id.*

The receiver's title or ultimate right of possession could not be tried in such a proceeding by him for contempt, but only in some appropriate action to be instituted against him: *Id.*

SALE.

Warranty—Rescission—Evidence.—In an action to *rescind a contract* and cancel promissory notes given for the right to use and sell a "patent screw-fork for elevating hay, grain, straw, &c.," *representations made by the vendor* "that the fork was in all respects a good one; that it would do good work, and would work in all kinds of hay, grain, straw, and other grass, and was in all respects fit for the use intended,"—*held* to amount to a *warranty: Elkins* v. *Kenyon and others*, 34 Wis.

If the instrument was one of no practical utility for the use intended, the plaintiff was entitled to a *rescission of the contract* on the ground of false and fraudulent representations: *Id.*

In the case of such an instrument, whose value depends upon the ability of *farmers generally* to use it successfully, if numerous witnesses of that class testify that they have given it a full, fair and exhaustive trial, and were unable to make it work, and others testify that they have tried it and it worked successfully, the rule generally applicable in weighing *positive* against *negative testimony* does not apply: *Id.*

STAMP.

Omission without Evidence of Intent—Where a party sues on an instrument which is required by the Act of Congress of 13th of July 1866, to be stamped, upon penalty that such instrument "shall be deemed invalid and of no effect," when the stamp is omitted, "with intent to evade the provisions" of the Act; and there is no evidence that the plaintiff, in omitting the stamp, intended fraudulently to evade those provisions, the instrument may be used in evidence: *Black* v. *Richardson*, 39 Md.

STATUTE.

Constructive Repeal.—Where two acts provide remedies, differing only in form, for the same substantial grievance, it would seem clear that the legislature intended by the later act to prescribe the only rules which should govern in such cases: *Montel* v. *Consolidation Coal Co.*, 39 Md.

Semble, that even though two statutes relating to the same subject be not, in terms, repugnant or inconsistent, yet if the later statute were clearly intended to prescribe the only rule which should govern in the case provided for, it will be construed as repealing the first: *Id.*

STREET. See *Highway; Municipal Corporation; Negligence.*

SURETY.

Evidence—Discharge by Tender.—There was evidence tending to show that L. was principal upon a note, and had deposited money which had been tendered, to pay the same, and had agreed to indemnify the defendant against the costs and expenses of a suit thereon. There was also evidence tending to show that H., another signer, was principal, and the defendant and L. sureties. The plaintiff requested the court to charge that, the defendant being indemnified, L. was principal and the defendant surety; and the refusal to so charge was *held* no error: *Joslyn* v. *Eastman*, 46 Vt.

When a debtor tenders payment of a debt for which a surety is ob-

ligated, and the creditor declines to receive it, he thereby discharges the surety: *Id.*

TORT.

Pleading — Joinder of Counts — Tort — Proximate Cause. — In an action against a railroad company the declaration contained two counts The *first* charged that the defendant, by its agents, so carelessly and negligently drove and conducted its locomotives and cars, that sparks and fire therefrom were dropped, blown, cast and spread by burning, in and upon plaintiffs' fences, trees, timber, &c., whereby the same were set fire to, burned and destroyed. The *second* averred in substance, that the mother of the plaintiffs, being seised of certain land, did, in 1862, by her deed, grant to the defendant a right of way through the same, subject to the condition that it should make and keep in repair substantial fences between the railroad and her adjoining lands; under which deed the defendant entered into and continued in the enjoyment of the said right of way, whereby it became and was its duty to perform all the conditions in said deed; that the mother of the plaintiffs died in 1871, leaving them her sole heirs-at-law and seised of the same land, but that, since that time, the defendant, in neglect of its duty, had suffered said fences to be out of repair, by reason whereof plaintiffs' land suffered from inroads of cattle, and their crops were destroyed, &c., whereby they sustained damage. Demurrer to this declaration, on the ground of misjoinder of counts, which was overruled, and, on appeal, it was *held:* that both counts were in *tort*, and so properly joined: *Philadelphia, W. & B. Railroad Co.* v. *Constable*, 39 Md.

Where the law imposes upon a party an obligation which he neglects to perform, whereby damage results to another, the party injured may bring an action on the case founded in *tort: Id.*

In an action against a railroad company, the defendant proved that a fire, for which damages were claimed, began on a lot owned by one H., immediately adjoining the railroad, and covered with broom-sedge and dry grass; that the fire burned across this lot, about one hundred and fifty yards, to the land of the plaintiffs, where it encountered a fence and dry grass, and, spreading from these, destroyed certain young timber, fences and fence rails on said land. *Held:* 1st. That the fact that the fire was first communicated to the material on the land of the adjacent proprietor, H., did not affect the defendant's responsibility to the plaintiffs. 2d. That the fire injured the plaintiffs' property in its natural and direct course, and by naturally and gradually spreading from the place where it began, without any intervening force or power, and the injury was, therefore, its proximate effect: *Id.*

TRUSTEE.

Failure to Invest Funds — Chargeable with Interest only.—When a trustee receives money which he should invest for the use and benefit of his *cestuis que trust*, but fails to do so, he will be charged with only simple interest, it not appearing that he used the trust funds, or employed them in his business, or in any other way by which he could have made gains: *Smith & Barber, Ex'rs.* v. *Darby*, 39 Md.